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No. 03-107

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY JO LARA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The United States seeks this Court's review to resolve a circuit conflict over whether 25 U.S.C. 1301(2) restores to Indian Tribes a sovereign power that they were held to have lost in *Duro* v. *Reina*, 495 U.S. 676 (1990)—namely, a Tribe's power to prosecute Indians who are members of other Tribes for offenses committed on its reservation. In this case, the Eighth Circuit, sitting en banc, held that *Duro*'s delineation of the scope of the Tribes' retained sovereign powers is constitutional in character, so that Congress cannot restore the Tribes' sovereign power to prosecute nonmember Indians or remove an impediment to its exercise. Pet. App. 8a. Then, to avoid rendering Congress's post-*Duro* amendment to Section 1301(2) "a legal nullity" (*id.* at 10a), the court interpreted it as vesting federal prosecutorial power to the Tribes. As a conse-

quence, the court held that, once a Tribe exercises the authority recognized in Section 1301(2) to prosecute a non-member Indian, a federal prosecution is barred by the Double Jeopardy Clause of the Fifth Amendment. *Id.* at 11a. In contrast, the Ninth Circuit, also sitting en banc, held that *Duro* rests on the common law, not on the Constitution, so that Congress could, and did in Section 1301(2), restore to the Tribes their sovereign power to prosecute non-member Indians. *United States* v. *Enas*, 255 F.3d 662 (9th Cir. 2001) (en banc), cert. denied, 534 U.S. 1115 (2002).

Respondent does not dispute that the Eighth and Ninth Circuits are in irreconcilable conflict over whether Section 1301(2), as amended after *Duro*, is a valid restoration of tribal sovereign power. Nor does respondent identify any reason why this is not an appropriate case in which to resolve the conflict definitively. Although respondent argues that the decision below is correct on the merits, that would be no reason, even if true, to withhold review. In any event, respondent's defense of the decision below is unavailing, as is his attempt to diminish its significance for effective law enforcement in Indian Country.

A. Nothing In The Constitution Or In This Court's *Duro* Decision Precludes Congress From Restoring The Tribes' Sovereign Power To Prosecute Members Of Other Tribes

On the merits, respondent contends that "*Duro* is a constitutional case," so that Congress cannot restore to Tribes the sovereign power at issue in that case. Br. in Opp. 5. Respondent does not, and cannot, point to any provision of the Constitution that speaks to which sovereign powers Tribes may continue to exercise after their incorporation into the United States. Nor does

Duro itself identify any constitutional provision that might have such effect. Respondent points instead to *Duro*'s references to provisions of the Constitution, such as those in the Bill of Rights, that protect citizens against "unwarranted intrusions on their personal liberty." *Ibid.* (quoting *Duro*, 495 U.S. at 692, and *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 210 (1998)).

Respondent misunderstands the context in which the Court invoked those constitutional provisions in *Duro*. It did so not to suggest that *Congress* could not recognize a tribal sovereign power to prosecute members of other Tribes—a question that was not presented in *Duro*—but rather to suggest that the *Court* itself should "hesitate" to do so in the absence of action by Congress. 495 U.S. at 693. The Court sought to distinguish its earlier holding in *United States* v. *Wheeler*, 435 U.S. 313 (1978), that Tribes retain the inherent power to prosecute their own members, reasoning that only a Tribe's members can be viewed as having consented to prosecution in its courts, where they would not be guaranteed all of the federal constitutional protections to which citizens are entitled. 495 U.S. at 693-694. At the same time, however, the Court recognized that the fact "[t]hat Indians are citizens does not alter the Federal Government's broad authority to legislate with respect to enrolled Indians as a class, whether to impose burdens or benefits." *Id.* at 692. The Court added that its consideration of non-member Indians' constitutional rights as citizens was undertaken "[i]n the absence of such legislation."

Ibid. Nothing in *Duro* thus precludes Congress, as a constitutional matter, from enacting legislation of the sort at issue here.

A tribal prosecution of a non-member Indian under the amended Section 1301(2) often does not present the concerns identified in the portion of *Duro* on which respondent relies. In most respects, the rights guaranteed criminal defendants in tribal court by the Indian Civil Rights Act are analogous to the rights guaranteed criminal defendants in federal and state court by the Constitution. The Indian Civil Rights Act includes most of the specific protections of the Fourth, Fifth, Sixth, and Eighth Amendments, as well as more general protections against denial of equal protection of tribal law and against deprivation of liberty or property without due process of law. See 25 U.S.C. 1302. Although some rights provided by the Constitution, such as the right to appointed counsel before imprisonment may be imposed even for a misdemeanor offense, are not provided by the Indian Civil Rights Act, many tribal prosecutions do not implicate those rights or are conducted consistently with them. (A tribal court may appoint counsel for an indigent defendant, for example, or may require the prosecutor to forgo seeking incarceration. See *Argersinger* v. *Hamlin*, 407 U.S. 25, 40 (1972).). In other cases, a defendant who claims to have been denied a right to which he is entitled under the Constitution may seek relief in the tribal court itself or, if convicted, from federal district court on habeas review under 25 U.S.C. 1303. The mere possibility that a particular non-member Indian might not be afforded identical rights in tribal court as in federal and state

court should not, therefore, call into question Congress's power to authorize Tribes to exercise criminal jurisdiction over such persons.

Here, respondent did not raise any claim in his tribal prosecution of the denial of any federal constitutional right. Although respondent now asserts that his "individual rights * * * are implicated by his prosecution by a sovereign which does not afford him his constitutional rights" (Br. in Opp. 6), he does not identify any particular right that was denied him or otherwise challenge the validity of his tribal prosecution. It is respondent's *federal* prosecution, not his *tribal* prosecution, to which his constitutional challenge is directed.

B. Congress's Post-*Duro* Amendment To Section 1301(2) Can Be Understood Only As A Restoration Of A Tribal Power, And Not As A Delegation Of A Federal Power

Respondent contends that the Eighth Circuit correctly interpreted the post-*Duro* amendment to Section 1301(2) as vesting federal prosecutorial power in the Tribes. Br. in Opp. 8-9. Respondent makes no attempt to reconcile that interpretation of the amendment with its text and legislative history.

The amendment, by its terms, "recognize[s] and affirm[s]" that the Tribes' "powers of self government" include "the inherent power * * * to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2). That language can be understood only as a restoration of that aspect of tribal sovereignty; the terms "inherent power" and "power[] of self government" denote power exercised by the Tribes as sovereigns. The House Committee Report confirms that the amendment "is not a federal delegation of this jurisdiction but a clarification of the status of tribes as domestic dependent nations." H.R. Rep. No. 61. 102d Cong., 1st Sess. 7

(1991); see S. Rep. No. 168, 102d Cong., 1st Sess 4 (1991) (describing amendment as "recogniz[ing] and reaffirm[ing] the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians"); H.R. Conf. Rep. No. 261, 102d Cong., 1st Sess. 3 (1991) (similar).

Nor is there any reason to suppose that Congress would have countenanced the vesting of federal prosecutorial power in the Tribes. Congress would not have wanted to bar the United States, acting through the Attorney General and the United States Attorneys, from prosecuting federal offenses committed by non-member Indians—including major felonies carrying substantial penalties—whenever the defendant had been prosecuted by a Tribe for an offense that contained the same elements but that necessarily carried only misdemeanor penalties.

C. The Circuit Conflict Over Congress's Ability To Restore The Tribes' Power To Prosecute Non-Member Indians Warrants The Court's Resolution In This Case

Respondent suggests that the Court should defer addressing the question presented by the petition until the circuit conflict has deepened. Br. in Opp. 9-10. There is no merit to that suggestion. This Court granted certiorari in *Duro* and *Wheeler* to resolve conflicts that likewise involved the Eighth and Ninth Circuits alone. See *Duro*, 495 U.S. at 684; *Wheeler*, 435 U.S. at 316 & n.6. Here, because the Eighth and Ninth Circuits both reviewed the question en banc, 22 appellate judges have had the opportunity to consider it, thereby assuring that the arguments on both sides have been fully explored. Those two Circuits, moreover, contain more than 80% of the recognized Tribes in

the United States,[1] thereby making prompt resolution of the conflict particularly appropriate. Although respondent also suggests that "[a]ction by Congress may make any decision on this case moot" (Br. in Opp. 10), the United States is aware of no pending legislation involving the Tribes' authority to prosecute non-member Indians, and respondent does not identify any such legislation.

D. This Case Presents Important Questions About The Scope Of Congress's Plenary Power Over Indians And Indian Tribes—And, In Particular, Over Criminal Law Enforcement In Indian Country

Respondent asserts that the question presented in this case is not of sufficient importance to be considered by this Court. Br. in Opp. 10-12. Respondent is mistaken.

Here, the Eighth Circuit held that the post-*Duro* amendment to Section 1301(2) would be constitutionally invalid as a restoration of a tribal sovereign power, and preserved the amendment only by interpreting it, contrary to its text and legislative history, as a grant of federal power. The scope of Congress's power in this area is important in its own right. In addition, the Court's grants of certiorari in *Duro*, *Wheeler*, and *Oliphant*, reflect the significance of questions concerning the extent of the Tribes' power to prosecute crimes committed on their reservations.

As explained in the petition (at 20-22), the question presented here also has significant ramifications for law enforcement in Indian Country, which operates most

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[1] According to information provided to this Office by the Bureau of Indian Affairs, of the 562 recognized Tribes in the United States (see 67 Fed. Reg. 46,328 (2002)), 455 are located in the Eighth and Ninth Circuits.

effectively when both the United States and a Tribe may prosecute a non-member Indian for conduct that violates their respective criminal laws. Prosecution by the United States assures that federal interests can be vindicated—such as the interest here in prosecuting respondent's acknowledged assault on a federal officer—and that penalties commensurate with the severity of the offense can be imposed. Prosecution by the Tribe prevents non-member Indians from avoiding justice altogether for misdemeanor-type offenses—which the United States or a State may lack the legal authority or resources to prosecute—and permits the vindication of distinct tribal interests in the security of the reservation community. Although, as respondent notes (Br. in Opp. 12), some of the adverse effects of the Eighth Circuit's decision may be avoided by cooperation between the United States and the Tribes, cooperation imposes additional burdens on federal and tribal prosecutors, and cannot be assured of occurring effectively in each and every case.[2]

* * * * *

[2] Respondent observes that, in addition to a double jeopardy challenge to his federal prosecution, he also raised a selective prosecution challenge. Br. in Opp. 1. The vacated panel opinion correctly rejected respondent's selective prosecution claim (Pet. App. 28a), and the en banc court did not address it. Although respondent invites this Court to consider the claim (Br. in Opp. 1), the claim is not in a suitable posture for the Court's review, since there is no operative ruling of the court of appeals on the claim. If this Court grants certiorari in this case and reverses the judgment of the Eighth Circuit on the double jeopardy claim, the court of appeals will have the opportunity to consider the selective prosecution claim on remand.

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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